Supreme Court, U.S.
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No. 92-38

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CHRYSLER CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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The Respondents, International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 thereof (hereinafter "Union"), respectfully request this Court to deny the petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America, AFL-CIO and Local 793*, 959 F.2d 685 (7th Cir. April 3, 1992).

COUNTER STATEMENT OF THE CASE

A. *The Current Procedural Status.*

The Petitioner, Chrysler Corporation (hereinafter "Chrysler") has not provided to this Court the complete and current procedural status of these proceedings. In its petition Chrysler only notes that, ". . . After the Court of Appeals entered judgment, the district court found the Union's contempt motion to be meritless . . ." (Chrysler Pet. p. 9, n. 3).

Chrysler failed to add that the Union on May 18, 1992 appealed the district court's May 1, 1992 order referred to by Chrysler (Pet. App. 63a) and that the Union's appeal is pending before the Seventh Circuit in *Chrysler Corp. v. Int'l Union AIW*, 7th Cir. Dkt. No. 92-2215, filed May 18, 1992.[1]

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[1] What gives rise to this present procedural state of affairs is that after the district court had issued its original judgment on January 26, 1990 (Pet. App. 43a), Chrysler did not reinstate the Grievant nor did Chrysler seek any stay of the district court's judgment. Chrysler instead filed a notice of appeal; wrote the Grievant and informed him that he was being reinstated; provided him one day's pay; and simultaneously informed him that he was discharged effective that same date, i.e., March 6 ,1990. (A copy of Chrysler's letter to the Grievant dated March 6, 1990 is attached to this brief as App. 1).

The Union's appeal to the Seventh Circuit is predicated upon 28 U.S.C. § 1292(a)(1) in that the district court's May 1, 1992 order giving effect to Chrysler's second discharge of the grievant was tantamount to the dissolution of the injunction, the validity of which had shortly before been affirmed by the Seventh Circuit in *Chrysler Motor Corp. v. Int'l Union, Allied Industrial Workers of America, et al.*, 959 F.2d 685 (7th Cir. April 3, 1992) (Pet. App. 1a-11a). The Union position in this regard is that Chrysler's "reinstatement" and simultaneous discharge of the Grievant does not constitute good faith compliance with the award as enforced by the district court and affirmed by the Seventh Circuit. *See Chicago Newspaper Guild v. Field Enterprises Inc.*, 747 F.2d 1153, 1156-1157 n.5 (7th Cir. 1984). See also *Aluminum Workers Int'l Union v. Chromalloy Amer. Corp.*, 489 F.Supp. 536, 543 (N.D. Miss. 1980); *Wilks v. Amer. Bakeries Inc.*, 563 F.Supp. 560 (W.D. N.C. 1983).

It was after the Union filed this appeal that Chrysler subsequently filed its petition for *certiorari* in the instant case.[2]

B. *The Decisions Below.*

Like its account of the present procedural status of this case, Chrysler's account of the prior arbitration and judicial decisions in this case is quite selective.

(1) *The Arbitration Decision.* Chrysler claims that the investigation that the Employer first conducted *after* having discharged the Grievant "revealed that the [Grievant] had engaged in a pattern of sexual harassment and sexual assault in the work place" (Chrysler Pet. 5). But, the arbitrator's statement of the "Facts" notes that there was testimony at the arbitral hearing of other incidents alleged to be sexual harassment. The arbitrator, however, made no findings either as to whether those incidents occurred, or whether the incidents amount to a "pattern of sexual harassment and sexual assault." The arbitrator declined to decide those factual questions because

> Nothing in the record suggests that [Chrysler] looked into any of the allegations of prior sexual harassment introduced in evidence before the decision to discharge the Grievant was made. A discharge decision must generally stand or fall on the evidence which the employer had in possession at the time it acted . . . Arbitrators expect the charge for which discipline

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[2] According to the district court Chrysler had satisfied its obligation under the award to reinstate the Grievant when on March 6, 1990 the Employer "reinstated" him, provided him a day's pay and simultaneously discharged him. If the district court's order of May 1, 1992 is correct, then the issue of whether Chrysler is under a duty to reinstate the grievant under the arbitration award has been made moot by Chrysler's conduct as Chrysler would have demonstrated that it was free to discharge the Grievant for his alleged acts of sexual harassment.

> was originally imposed, not something the employer cites for the first time at the arbitration hearing. [Pet. App. 59a.]

The arbitrator's decision accompanying the award, far from ignoring or minimizing the public policy concerns surrounding sexual harassment allegations, gave extensive attention to those concerns as part of the "just cause" determination. That decision, first, pointed out that "Sexual harassment in the workplace is of serious concern to employers, employees, and unions," and noted that "Sexual harassment includes unwelcome physical conduct of a sexual nature when such conduct has the purpose or effect of creating a hostile or offensive working environment." *See* 29 C.F.R. § 1604.11. (Pet. App. 52a.) Further, the arbitrator expressly recognized that "Acts such as that of the Grievant here are outrageous . . . [and] interfere[] with the privacy and dignity of [female employees]." (Pet. App. 51a.)

The arbitrator then reviewed eighteen reported arbitration cases concerning sexual harassment claims and noted that in almost all instances in which there was either no prior warning or no evidence of multiple incidents, a lengthy suspension rather than a discharge was ordered. Applying similar principles, the arbitrator found that ". . . the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior . . ." (Pet. App. 61a) and that

> severe discipline short of discharge should be adequate to demonstrate to all employees the Employer's opposition to sexual harassment and to deter the Grievant from any repeat of his disgraceful conduct. Because the penalty here was too severe under all the circumstances, it is concluded that there was not good cause to discharge the Grievant. However, there was good cause to suspend the Grievant for 30 work days. [Pet. App. 62a.]

(2) *The Court Opinions.* The district court reviewed the arbitration award and held not simply that the en-

forcement of the award would not offend the public policy aimed at eliminating sexual harassment in the workplace, but that *the award was consonant with that policy as properly defined*. Specifically, the district court recognized both that eliminating sexual harassment at the workplace is a matter of public policy and that under Title VII and other applicable statutes the ". . . employer need not fire the offending employee in all instances." (Pet. App. 87a.) Rather, as the district court noted, the public policy in question requires that "an employer's response to alleged instances of employee harassment . . . be reasonably calculated to prevent further harassment under the particular facts." Under the facts of this case, the district court held that a thirty-day suspension without pay met that standard. (Pet. App. 37a-38a.)

The Court of Appeals opinion, in turn, was principally concerned with Chrysler's contention that the labor contract as construed by the arbitrator was discriminatory in that sexual assault was generally treated as less serious than the kinds of behavior that merit discharge without prior warnings or discipline. The Seventh Circuit responded to that "double standard" discrimination contention—pressed by the Employer as its principal argument in the appellate court but now, apparently, abandoned—by finding that the arbitration decision did not rest on a discriminatory general standard, but on the conclusion that the Grievant's *particular* conduct was not serious enough to justify discharge without prior discipline. (Pet. App. 6a.)

The Court of Appeals, moreover, did not reach the broad question Chrysler seeks to have this Court address: what is the general standard for determining when arbitral reinstatement of a sexual harasser violates public policy. Instead, the Seventh Circuit concluded only that given the Grievant's actual behavior and circumstances, his reinstatement did not violate the public policy requiring the eradication of sexual harassment in the work-

place. (Pet. App. 7a-8a.) And the Seventh Circuit specifically *declined* to disapprove (or approve) the decisions holding that under some circumstances arbitral reinstatement of an employee can violate public policy although the reinstatement is not itself illegal, noting that in those cases, unlike this case, the behavior at issue involved "integral to job performance and threatening public health or safety." (Pet. App. 8a, n.3.)

REASONS FOR DENYING THE WRIT

I. THE ENFORCEMENT OF THE ARBITRATION AWARD HERE IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *PAPERWORKERS v. MISCO, INC.*, 484 U.S. 29 (1987) AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE VACATION OF ARBITRATION AWARDS REINSTATING EMPLOYEES CHARGED WITH SEXUAL HARASSMENT

Chrysler argues that the arbitration award in this case suspending and then reinstating an employee discharged for committing a single act of sexual harassment necessarily violates public policy and should have been vacated. Nothing in *Paperworkers v. Misco*, 484 U.S. 29 (1987) provides a basis for so draconian a rule, and no court of appeals opinion conflicts with the Seventh Circuit's conclusion that there is no such "public policy" rule.

(a) This case is all but a carbon copy of the case before this Court in *Misco* where this Court dealt with the public policy defense to the enforcement of an arbitration award requiring the reinstatement of an employee.

The only difference is that in *Misco* the public policy claimed to be offended by the arbitrator's reinstatement award was the threat posed to work place safety, *e.g.*, 484 U.S. at 34-35, while in the instant case Chrysler claims the arbitrator's award violates the public policy aimed at eliminating sexual harassment in the work place (Chrysler Pet. 10) ("The court of appeals' decision to enforce that reinstatement order is inconsistent with

the public policy of this Nation to end work place sexual harassment . . .").

In *Misco* this Court pointed out that the recurring issue of safety in the workplace is grist for the arbitral mill. 484 U.S. at 45 n.11. The same is true of sexual harassment in the workplace. *See* Elkouri & Elkouri, *How Arbitration Works*, Protecting Against Sexual Harassment pp. 777-781.

The impartial arbitrator in the instant case—who was chosen by the parties—recognized that the Grievant's conduct constituted sexual harassment under 29 C.F.R. § 1604.11 and stated, ". . . The only significant question is whether the penalty imposed by the Employer was appropriate under the circumstances . . ." (Pet. App. 52a). The arbitrator here, in arriving at his answer to that question, reviewed some eighteen reported awards in cases that dealt with employee discipline for having engaged in sexual harassment (Pet. App. 52a-60a). The arbitrator here, moreover, gave consideration to the same seven factors (Pet. App. 51a) that were considered by the arbitrator in *Misco*, 484 U.S. at 34 n.5. Also, the arbitrator here refused to permit Chrysler to rely on later acquired evidence first introduced at the arbitration hearing to support its decision to discharge the Grievant which evidence Chrysler had not relied on at the time it made its discharge decision. (Chrysler Pet. App. 59a).[3] The arbitrator had done the same in *Misco*, 484 U.S. at 34 n.6.

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[3] The arbitrator permitted Chrysler to introduce such evidence. The arbitrator held however that the evidence could not be used to support the discharge decision. The arbitrator did not *hold* that such evidence could not be taken into account in arriving at his determination that a 30 workday suspension would be justified. It should be noted that *Misco* was decided five years ago and Chrysler has made no showing as to why a full investigation could not have been conducted before making its decision to discharge the Grievant. The tactic of trial by "ambush" has been frowned on for years.

In the end Chrysler's *certiorari* petition reflects nothing more profound than the Employer's disagreement with the impartial arbitrator's findings that "Severe discipline short of discharge should be adequate to demonstrate to all employees the Employer's opposition to sexual harassment and to deter the Grievant from any repeat of his disgraceful conduct . . ." (Pet. App. 62a), and that ". . . the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior . . ." (Pet. App. 61a).

(b) Notwithstanding these findings by the impartial arbitrator, Chrysler argues that the policy against sexual harassment is fundamentally different from other public policies protecting the general public and fellow employees. Chrysler's contention, at bottom, is that the public policy that governs here requires that *any* misconduct involving sexual harassment be subject to the automatic penalty of discharge or to the employer's absolute discretion to impose any penalty the employer deems fit and proper. *See* Chrysler Pet .10.

But, as articulated by Congress and the courts, the governing public policy does not require automatic discharge as the penalty whenever there is employee misconduct that constitutes sexual harassment in one form or another. Rather, as the Seventh Circuit recognized, Title VII requires only that "Employers must take all necessary steps to prevent sexual harassment in the workplace, such as expressing strong disapproval of the conduct and developing appropriate sanctions." 29 C.F.R. 1604.11 (d) (f) (1991). (Pet. App. 5c.)

Thus, no public policy dictates that discharge is necessary in order for employers to send a "message" that such conduct is unacceptable in the workplace. The employer can also send such a message by other means including the posting of notices on bulletin boards and otherwise communicating to and educating employees and supervisors that harassment of all kinds at the workplace, i.e.,

sexual, racial, ethnic, and religious etc. is impermissible and that employees engaging in such conduct will be subject to corrective progressive discipline up to and including discharge. The Union would, of course, gladly participate *and* cooperate in any such program aimed at eliminating all forms of harassment in the workplace and particularly the type of harassment that creates a hostile work environment for women workers.

Chrysler's view of public policy—that an employer must act "decisively" and that the employer must therefore have the total and absolute discretion to impose whatever degree of discipline the employer chooses in a case where the employee has engaged in an act of sexual harassment—is fundamentally unfair. Factors such as the employee's years of continuous service and his/her otherwise unblemished work record would be disregarded even though the employee could be rehabilitated and could correct his behavior, as the arbitrator here found was true of the Grievant. Not surprisingly, then, Chrysler is unable to cite any statute, regulation or case stating that in order to act "decisively" employers must always be free to discharge for sexual harassment.

It is precisely because management and labor can agree that an employee's conduct warrants discipline, as was true in the instant case, but still disagree on the degree of discipline that may be warranted that it is so important that the judgment of an impartial arbitrator, where arbitration has been agreed to in the parties' labor contract, should be enforced. This Court so recognized in *Misco* and the Seventh Circuit, following *Misco*, so recognized in upholding the validity of the award here.

In particular, this Court made it clear in *Misco* that where the arbitrator in directing reinstatement had found that an employee would not be likely to again engage in the conduct that had led to his discipline, a court of appeals should not upset the award on public policy grounds.

484 U.S. at 45 ("Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened . . .".)

(c) The Seventh Circuit's decision is not only consistent with this Court's *Misco* decision, but, also, with *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 842-43 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1991), and the other court of appeals cases concerning the application of *Misco* to discharges for sexual harassment cited by Chrysler.

Chrysler's claim that the Seventh Circuit made no effort to address the Second Circuit's public policy analysis in *Newsday* is simply incorrect. The Court of Appeals stated its agreement with *Newsday's* ruling that there is a well-defined and dominant public policy that is aimed at eliminating sexual harassment at the workplace. (Pet. App. 19.) What the Seventh Circuit held is that on the facts in *this* case, unlike those in *Newsday*, that policy did not demand the Grievant's discharge.

The Second Circuit in *Newsday* was dealing with a case where the employer had previously given a four day disciplinary suspension to an employee for having engaged in the sexual harassment of a female co-worker, a suspension upheld by an arbitrator. Subsequently, that employee, even after having been suspended and warned of the consequences, again engaged in misconduct of such a nature on three occasions. The employer then discharged him.[4]

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[4] In *Newsday*, unlike here, the employer conducted an investigation *prior* to reaching its decision to discharge the grievant. The investigation revealed at least three incidents of sexual harassment *after* the grievant had previously been suspended for such mis-

In such circumstances, and taking into account the prior disciplinary suspension the employee had received, the Second Circuit agreed with the district court that a *second* arbitration award ordering the employer to reinstate the employee would *not* be consistent with the public policy aimed at eliminating sexual harassment at the workplace; in *Newsday* it was that second award that was not enforced.

The Grievant in the instant case, in contrast, had never before been disciplined for any misconduct. As the Seventh Circuit noted, "The arbitrator found it significant that [Grievant] had not received warning or discipline for any prior misconduct before being discharged." (Pet. App. 7a.)

To be sure, Chrysler now argues that the evidence of certain earlier alleged incidents of misconduct the Employer acquired only after discharging the Grievant—and first presented at the arbitration hearing—should be treated as the equivalent of the evidence of multiple incidents in *Newsday*.[5] But all that Chrysler's argument shows is how lax its management had been and how little Chrysler was doing to inform itself about sexual harassment in the workplace.

Even when Chrysler first learned of the incident in question here the Employer made no effort to fully in-

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conduct. The employer in such circumstances based its decision to discharge on *all three of the prior incidents* that its investigation had disclosed, and therefore the union and the employee knew prior to the arbitration hearing the basis for the employee's discharge.

[5] Arbitrators will generally not permit employers to use after-acquired evidence to support an earlier discharge decision, particularly where the after-acquired evidence is introduced for first time at the arbitration hearing. The trial courts apply a similar principle. *See Applewood Landscape & Nursery Co. v. Hollingsworth*, 884 F.2d 1502, 1507 (1st Cir. 1989). This is a simple matter of procedural fairness. As a result an employer contemplating disciplinary action must investigate fully *before* arriving at its decision and not afterwards.

vestigate into whether the Grievant had ever engaged in any such conduct in the past. And there is no evidence that Chrysler made any attempts to thereafter communicate to all of its employees that conduct involving sexual harassment is not acceptable at the workplace and that employees engaging in such conduct would be subject to discipline up to and including discharge.

In sum, the Seventh Circuit did not have the issue before it in enforcing the reinstatement award in the instant case that the Second Circuit had in *Newsday*: *viz.*, the validity of the reinstatement to the workplace of an individual who had previously received a disciplinary suspension for having engaged in sexual harassment of female co-employees, had been forewarned of the serious consequences if such conduct continued and still persisted in engaging in such conduct thereby creating a hostile work environment for women employees.

Nor is the Seventh Circuit's decision in this case inconsistent with the two other federal court of appeals cases addressing the application of *Misco* to discharges for sexual harassment. *Communication Workers v. Southeastern Electric Corp.*, 882 F.2d 467 (10th Cir. 1989), *enforced* an arbitration order reinstating an employee found to have engaged in sexual harassment on the basis that the arbitration award (like the one here) took account of the public policy concerns under all the circumstances. And, while *Strochmann Bakeries v. Local 776*, 140 LRRM 2625 (3rd Cir., June 29, 1992), recently affirmed the vacation of an arbitration award concerning alleged sexual harassment, that decision gives Chrysler no comfort.

Strochmann involved an employee who had been discharged after a customer had reported him for sexual harassment. The arbitrator had ordered the employee reinstated with full back pay because he concluded the employer had not afforded the grievant a full opportunity to refute the charge or explain his conduct. The Third

Circuit's majority opinion held only that reinstating the grievant without deciding whether the charge of sexual harassment was true conflicted with the public policy aimed at eliminating sexual harassment at the workplace. But the majority in *Stroehmann Bakeries* did not hold that an order reinstating an employee discharged for a single incident of sexual harassment is, without more, void as against public policy.

What the pertinent Court of Appeals decisions taken as a whole reveal, then, is that *Misco* is the uniform starting point from which all the court of appeals begin their public policy analysis when called upon to determine whether the enforcement of a particular arbitration award would violate a public policy.

In cases invoking the public policy of eliminating sexual harassment at the workplace the courts of appeals have carefully reviewed arbitration awards that require the reinstatement of an employee who had been found to have engaged in such an offense in order to make certain that the arbitrator's reinstatement award would not conflict with that policy.

The Seventh Circuit did so here as its decision demonstrates. The Court of Appeals concluded that the enforcement of the arbitration award which imposed a 30 work day suspension on the Grievant would not be inconsistent with public policy. The Seventh Circuit's decision is not in conflict with other courts of appeals decisions and is consistent with *Misco*. Chrysler has not shown a single good reason as to why this Court should review that decision.[6]

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[6] In an elaborate—albeit somewhat convoluted—argument, Chrysler seeks review on the separate question, not limited to the sexual harassment context, of whether an employer can seek to vacate an arbitration award on the basis of incidents of misconduct which were not the basis of the discharge. Pet. 21-27. Chrysler's contention that *Misco* sanctioned the use of after-acquired evidence for

II. THE COURT OF APPEALS OPINION DID NOT DECIDE THE QUESTION LEFT OPEN IN *PAPERWORKERS v. MISCO, INC.*, AND IS NOT IN CONFLICT WITH ANY OTHER COURT OF APPEALS OPINION ON THE GENERAL STANDARD GOVERNING THE VACATION OF ARBITRATION AWARDS ON PUBLIC POLICY GROUNDS

In its third Question Presented, Chrysler asks this Court to determine whether "a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violates the law or requires the employer to violate the law." (Chrysler Pet. (i).)

Chrysler's argument in support of granting *certiorari* on this question is that "[t]he *courts* below thus decided in the affirmative the question expressly left open by this Court in *Misco* . . . 484 U.S. at 45 n.12." (Chrysler Pet. 28, emphasis supplied.) The only quotation presented to demonstrate that there was a holding on this question in this case, however, is from the *district court* opinion.

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purposes of evaluating a public policy argument clearly does not justify a grant of *certiorari* in this case, for two reasons.

First, contrary to Chrysler's claim, the Seventh Circuit did not ignore Chrysler's contention that it is sometimes appropriate to use after-acquired evidence to justify vacating an arbitration award as against public policy. *See* Chrysler Pet. 2 ("The Seventh Circuit simply ignored [*Misco's*] carefully drawn distinction in this case.") To the contrary, the Seventh Circuit expressly *agreed* with Chrysler's fundamental contention that under *Misco*, a "Court of Appeals [may] properly review[] established evidence that was not considered by the arbitrator in its public policy inquiry." (Pet. App. 9a n.4.) The Seventh Circuit refused to rely upon Chrysler's evidence regarding sexual harassment incidents not discovered until after the discharge because those facts were *not* "established" through the fact-finding mechanism agreed upon by the parties, the arbitral forum, not because those facts were not advanced or relied on in making the discharge in the first instance. (*Id.*)

Second, Chrysler is not able to point to any conflict or confusion in the courts of appeal on this question. To the contrary, the employer admits that the lower courts have been uniform in their interpretation of the part of *Misco* concerning the relevance of after-acquired evidence in public policy cases. (Chrysler Pet. 26-27.)

(Chrysler Pet. 25.) Nonetheless, the petition goes on to argue that the *Court of Appeals* decision here conflicts with those of the Second, Tihrd, Sixth and Eleventh Circuits in this regard. (Chrysler Pet. 25-26.)

The artful wording of Chrysler's representation notwithstanding, the Seventh Circuit opinion here expressly *declined* to rule on the question left open in *Misco* concerning the precise relationship necessary between a well-defined, dominant and explicit public policy and an arbitrator's order.

The Court of Appeals in this case did expressly note that other courts of appeals have taken a broad view of the public policy exception and have declined to enforce arbitration awards that do *not* violate positive law and do *not* require the employer to do so. (Pet. App. 8a n.3, citing *inter alia*, *Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).)

The opinion below, however, neither approved nor disapproved those decisions. Rather, the Seventh Circuit regarded those decisions as simply inapplicable in the current context, since this case, like *Misco*, involved a violation of public policy that did not occur "while [the employees were] performing duties integral to their employment." (Pet. App. 8a n.3.) The Seventh Circuit explicitly left open the possibility that under circumstances not here present—*viz.*, "where the discharged employees' conduct violated public policies while performing duties integral to their employment and where reinstatement would have jeopardized public health or safety"—an arbitration award could be vacated although the award neither violates positive law nor requires an employer to do so. (*Id.*)

Moreover, in claiming that the decision below conflicts on the broad question left open in *Misco* with those of other courts of appeals, Chrysler mischaracterizes not

only the Seventh Circuit decision in this case, but also the decisions asserted to be in conflict.

The Sixth Circuit, in *Interstate Brands Corp. v. Teamsters Local 135*, 909 F.2d 885, 893 (6th Cir. 1990), for example, clearly did *not* decide that an arbitration award can be vacated without a showing that the award or the employer actions ordered are affirmatively illegal. Rather, *Interstate Brands* held that public policy is *not* violated by an arbitration order reinstating an individual convicted of drunk driving since "the policies of the states involved do not attempt to prohibit driving by persons . . . convicted of drunk driving . . . [unless their] licenses have been revoked." According to the Sixth Circuit, "The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring reinstatement . . . violated some explicit public policy." 909 F.2d at 893. *See also, Shelby Cty. Health Care Corp. v. AFSCME*, 140 LRRM 2680 (6th Cir., June 24, 1992) (citing *Interstate Brands* and holding that even where the grievance involves employment-related conduct in violation of pubilc policy, an arbitration award can be vacated only if the employer lacks discretion, under the applicable public policy, to retain or reinstate the employee in question.)

Similarly, *United Postal Service v. National Ass'n of Letter Carriers*, 839 F.2d 146 (3rd Cir. 1988), refuses to vacate an arbitration award reinstating an employee who committed physical violence against a supervisor because such "violent conduct (assuming, *arguendo*, that such a policy is properly ascertained) does not *require* [the employee's] discharge for its fulfillment." *Id.* at 149-50 (emphasis added). Like the Seventh Circuit here, the Third Circuit in *United Postal Service*, having ascertained that on the particular facts the employee's discharge was not required to vindicate public policy, declined "to reach this question of where lies the precise

boundary around our reviewing authority." 839 F.2d at 150.[7]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[7] The other two cases asserted to be in conflict with the Seventh Circuit's decision in this case on the ultimate standard applicable in cases seeking to void arbitration agreements on public policy grounds are *Delta Airlines*, *supra*, and *Newsday*, *supra*. *Delta Airlines*, as stated in text, was duly noted by the Seventh Circuit and distinguished, not rejected. And *Newsday* did not in terms articulate a standard applicable in public policy arbitration cases generally; as shown in Part I, *supra*, *Newsday* is, moreover, fully compatible with the decision below on the specific question of the application of the public policy exception to sexual harassment cases.

APPENDIX

ACUSTAR
A Chrysler Motors Company

CHRYSLER MARINE AND INDUSTRIAL

March 6, 1990

Ronald Gallenbeck
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Beaver Dam, Wisconsin 53916

Dear Mr. Gallenbeck:

Pursuant to the evidence uncovered during preparation for the arbitration hearing in this matter which revealed other acts of harassment on your part directed at female co-workers, the decision has been made to terminate your employment, effective immediately. However, in lieu of returning you to work only to then effect your discharge, enclosed is check 62036, in the amount of $47.20, less standard deductions, representing compensation for reinstatement for one day.

Very Truly yours,

/s/ J.G. Ihler
J.G. IHLER
Personnel Manager

cc: Dale Maas